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No. 09-998

In The Supreme Court of the United States

SHAWN DRAKE,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

PETITIONER HAS FAILED TO STATE "COMPELLING REASONS" FOR REVIEW ON CERTIORARI PURSUANT TO SUPREME COURT RULE 10.

Petitioner herein points to the "wide spectrum of procedural approaches," employed by various courts across the country, both state and federal, in applying the principles of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), as evidence that: "These uneven approaches fail to adequately ensure compliance with the principles of *Batson* and result in a conflict between the states and the federal courts." (Petition, pp. 5-6.) Presumably, this Court disagrees. In the nearly quarter of a century since *Batson* was handed down, not once has this Honorable Court granted certiorari to scrutinize the *procedures* applied by the trial court, either during trial or upon remand, when presented with a *Batson* objection. Furthermore, this Court in *Batson* clearly *anticipated* that diverse procedural approaches would be utilized to carry out this Court's pronouncement. As such, there is no "conflict between the states and federal courts" as alleged by petitioner.

In *Batson v. Kentucky*, this Court stated in pertinent part:

> Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not

> experienced serious administrative burdens, and the peremptory challenge system has survived. ***We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutors' challenges.*** (Emphasis added.)

In a footnote, this Court noted, "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." With regard to the case at bar in *Batson*, this Court remanded "this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his actions, our precedents require that petitioner's conviction be reversed."

In this instance, the Supreme Court of the State of Louisiana has already found a prima facie case of purposeful discrimination, which leaves only for the prosecutor to come forward with his race-neutral explanations. As clearly indicated by this Honorable Court, the manner in which this task is accomplished is within the sound discretion of the trial court.

This Honorable Court's policy of deferring to the trial court on procedural matters in the context of a *Batson* challenge, has been carried forward in the evolution of *Batson*. In *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), this Honorable Court held that a white defendant in a criminal

case "can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race." Therein, this Court reiterated that: "***It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice.***" (Emphasis added.)

In *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), this Court held that "courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial." This Court concluded:

> It remains to consider whether a prima facie case of racial discrimination has been established in the case before us, requiring Leesville to offer race-neutral explanations for its peremptory challenges. In *Batson*, we held that determining whether a prima facie case has been established requires consideration of all relevant circumstances, including whether there has been a pattern of strikes against members of a particular race. The same approach applies in the civil context, ***and we leave it to the trial courts in the first instance to develop evidentiary rules for implementing our decision.*** (Emphasis added.) (Citations omitted.)

More recently, in *Johnson v. California*, 545 U.S. 162, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005), while

concluding that "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima face case," this Honorable Court reiterated "that States ***do have flexibility in formulating appropriate procedures to comply with Batson***. . . ." (Emphasis added.)

Despite this Court's entrenched policy of deference and flexibility, petitioner avers that:

> . . . because of the passage of time and because the prosecutor has the opportunity to create race-neutral reasons that are not contemporaneous with a peremptory strike, ***the defendant should be always entitled to cross examine the prosecutor and have access to the prosecutor's notes***. The procedure should be uniform among the country's courts, not merely available based upon geographic location. (Petition, p. 7.) (Emphasis added.)

Petitioner herein was convicted on July 2, 2003. Because petitioner herein won an out-of-time appeal on post-conviction relief, his *Batson* claim was finally resolved on April 13, 2009, when the state's application for a rehearing was denied by the Supreme Court of the State of Louisiana. The hearing ordered on remand from the state's highest court was first set to take place on June 8, 2009, nearly a year ago, but was continued at the request of defense counsel. (The *Batson* hearing is presently set for April 30, 2010.) As such, the lapse of time between trial and remand in this matter was less than six years. This lapse of time

is not an unusual occurrence. The passage of time from the trial in *Batson v. Kentucky* to the remand was two years. Approximately four years and three and one-half years had elapsed between trial and remand in *Powers v. Ohio* (Brief for Petitioner, 1985 WL 667872) and *Edmonson v. Leesville Concrete Company, Inc.* (Joint Appendix, 1990 WL 10023007, Brief for Respondent, 1990 WL 505495), respectively.

In *Johnson v. California*, the petitioner was convicted in 1998 and remanded by this Honorable Court in 2005, a period of time in excess of the lapse in the case at bar. Clearly, this Court did not find these circumstances to warrant special instructions to the trial court on remand. On remand, the petitioner argued that he should receive a new jury trial because "too much time has elapsed since the jury selection, which concluded in December 1998, between seven and eight years ago." *People v. Johnson*, 38 Cal.4th 1096, 136 P.3d 804, 45 Cal.Rptr.3d 1 (2006). The Supreme Court of California disagreed, citing remands from various federal courts in cases in which a comparable amount of time had elapsed. The California court further noted that: "In this case, the court and parties have the jury questionnaires and a verbatim transcript of the jury selection proceeding to help refresh their recollection. The prosecutor may have notes he took during the jury selection process." This is true of the case at hand as well.

Petitioner further argues, citing this Court's decision in *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), that because "the

trial judge's findings in the context under consideration here largely will turn on evaluation of credibility . . . ," the prosecutor should in all cases be placed under oath and subject to cross-examination. (Petition, p. 7) In another case cited by petitioner herein, *Gray v. Maryland*, 317 Md. 250, 562 A.2d 1278 (Md. 1989) (Petition, p. 9), the defendant also requested that the prosecutor be placed under oath and subject to cross-examination at step two of the *Batson* analysis. The prosecutor objected, arguing that "it was neither necessary nor appropriate to place the prosecutor under oath or to subject him to cross-examination." The trial court agreed and quashed the subpoena. The Maryland Supreme Court found no abuse of discretion. Among the reasons for its ruling, the Maryland court noted that the prosecutor is an officer of the court, and that:

> Rule 3.3 of the Maryland Lawyers' Rules of Professional Conduct requires that '[a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal.' We have said that 'no moral character qualification for bar membership is more important than truthfulness and candor.' A trial judge calling upon the prosecutor to explain his challenges has every right to expect total candor without resorting to the administration of an oath. (Citations omitted.)

Similarly, Louisiana's Rules of Professional Conduct require, in Rule 3.3, that "A lawyer shall not knowingly: make a false statement of fact or law to a

reversal and new trial," noting defendant's misplaced reliance on California law:

> [D]evelopments since our most recent refusal to order a limited remand, including especially the high court decision in this case, convince us that we should now adopt the federal approach . . . The error in *Snow*, and cases it cited was one of state law. The error here was a federal constitutional violation.

The California high court thus rejected the applicability of these cases in their entirety to a *Batson* situation.

In fact, the *only* cases petitioner has cited wherein the court has found that the prosecutor is *always* subject to cross-examination in a *Batson* hearing are two cases out of the State of Texas. In *Williams v. State*, 767 S.W.2d 872 (1989), an intermediate appellate court, in approximately two pages, boldly and unceremoniously proclaimed that the prosecutor is *always* subject to cross-examination on his race-neutral reasons. In *Salazar v. State*, 795 S.W.2d 187 (1990), the Court of Criminal Appeals of Texas, citing the *Williams* case, held that *Batson* hearings should be held in open court, that the prosecutor is subject to cross-examination on his race-neutral reasons, *and* that the state was obliged to produce its "juror information notes." While opinions may differ regarding the propriety of these decisions (see the twenty-two pages of dissent in *Williams*, as well as the dissent in *Salazar*), at the end of the day, it was within the discretion of these state courts to

"formulate particular procedures to be followed" in those cases. *See Batson v. Kentucky.*

Petitioner also cites the Florida case of *Marshall v. State*, 593 So.2d 1161 (Fla. 2d DCA 1992). In that case, an intermediate appellate court in Florida remanded to the trial court with instructions to "conduct a full evidentiary hearing" at which: "The prosecutor who exercised the peremptory challenges must testify under oath concerning the actual reasons she relied on to exercise these challenges. . . ." However, this case addresses ***not the procedure to be employed in a Batson hearing, but, the procedure to be employed in a "Neil" inquiry, a creation of Florida law.*** Notably, in *State v. Neil*, 457 So.2d 481 (Fla. 1984), which predates *Batson*, the court made clear that, "Because the United States Supreme Court has not ruled on this issue, ***we prefer to rely on our state constitution instead of engaging in an analysis of federal constitutional issues.***" (Emphasis added.) This explains the *Marshall* court's stated purpose of assuring "a remedy equal to ***or greater than that provided in Batson***. . . ." (Emphasis added.) In any event, while that court held that on remand, the prosecutor "must testify under oath," there was no corresponding order that the prosecutor thereafter be subject to cross-examination by defense counsel.

Petitioner purportedly cites from "Wigmore on Evidence" that: "Cross-examination of the prosecutor is appropriate because it enjoys an exalted position in the adversary system of justice and is the 'greatest

legal engine ever invented for the discovery of the truth.'" (Petition, p. 10.) This quote is actually taken from *Gray v. Maryland*, 317 Md. 250, 562 A.2d 1278 (1989), which states that cross-examination *in general* enjoys an exalted position, *not specifically cross-examination of a prosecutor.*

Petitioner further avers that, "The prosecutor enjoys no special privilege as a witness." This is not entirely true in Louisiana. The practice of calling lawyers, and, more specifically, prosecutors, as witnesses, is clearly disfavored in Louisiana. La. Code Evid. Art. 507 states in relevant part as follows:

> **Art. 507. Subpoena of lawyer or his representative in criminal cases**
>
> **A. General rule.** Neither a subpoena nor a court order shall be issued to a lawyer or his representative to appear or testify in any criminal investigation or proceeding where the purpose of the subpoena or order is to ask the lawyer or his representative to reveal information about a client or former client obtained in the course of representing the client unless the court after a contradictory hearing has determined that the information sought is not protected from disclosure by any applicable privilege or work product rule; and all of the following:
>
> (1) The information sought is essential to the successful completion of an ongoing investigation, prosecution, or defense.

(2) The purpose of seeking the information is not to harass the attorney or his client.

(3) With respect to a subpoena, the subpoena lists the information sought with particularity, is reasonably limited as to subject matter and period of time, and gives timely notice.

(4) There is no practicable alternative means of obtaining the information.

The information which petitioner seeks, i.e., the state's voir dire notes, as well as the prosecutor's mental impressions and trial strategy with respect to voir dire, are clearly protected from disclosure by the work product rule in Louisiana. Additionally, the information sought is *not* essential to the defense, given the trial court's intention to review the prosecutor's notes in camera if the need arises. Furthermore, the Louisiana Code of Criminal Procedure provides, in relevant part, as follows:

> **Art. 723. State reports and other matters not subject to disclosure**
>
> Except as provided in Articles 716, 718, 721, and 722, this Chapter does not authorize the discovery or inspection of reports, memoranda or other internal state documents made by the district attorney or by agents of the state in connection with the investigation or prosecution of the case; or of statements made by witnesses or prospective

> witnesses, other than the defendant, to the district attorney, or to agents of the state.

The Supreme Court of the State of Louisiana, in *State v. Rey*, 351 So.2d 489 (1977), recognized the foregoing provision as the codification of the "work product privilege." The state supreme court later discusses the scope of this privilege in *Hodges v. Southern Farm Bureau Casualty Insurance Company*, 433 So.2d 125 (La. 1983):

> Whereas the attorney-client privilege protects only confidential communications, ***the opinion work product doctrine may encompass any writing prepared in anticipation of litigation by the attorney*** . . . The purpose of the work product doctrine is not merely to assist the client in obtaining complete legal advice, but also to afford the attorney a 'zone of privacy' within which he is free to evaluate and prepare his case without adversarial scrutiny. (Emphasis added, citations omitted.)

In a footnote, the Supreme Court of the State of Louisiana cited Justice Murphy of this Honorable Court, in *Hickman v. Taylor*, 329 U.S. 495, 91 L.Ed. 451, 67 S.Ct. 385 (1947), who explained the rationale for the rule:

> Historically a lawyer is an officer of the court and is bound to work for the advance of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy,

> free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote and protect their client's interest. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.'

The work product rule in Louisiana, as codified in Louisiana Code of Criminal Procedure Article 723, appears to be absolute, mandatory, and subject only to the very limited exceptions of the discovery of statements of the defendant, his coconspirators, and confessions of codefendants. In addition, Louisiana Code of Criminal Procedure Article 718 states as follows:

> **Art. 718. Documents and tangible objects**
>
> Subject to the limitation of Article 723, on motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect, copy, examine, test scientifically, photograph, or

> otherwise reproduce books, papers, documents, photographs, tangible objects, buildings, places, or copies or portions thereof, which are within the possession, custody, or control of the state, and which:
>
> (1) are favorable to the defendant and which are material and relevant to the issue of guilt or punishment, or
>
> (2) are intended for use by the state as evidence at the trial, or
>
> (3) were obtained from or belong to the defendant.
>
> The court may determine whether evidence is subject to the provisions of Paragraph (1) hereof by in camera inspection.

It has not been suggested that any of the foregoing exceptions apply. As such, applying Louisiana law, the trial court in this matter properly denied petitioner's request for the prosecutor's voir dire notes, which very ***clearly*** fall within the purview of "attorney work product." The Louisiana Court of Appeal, Fifth Circuit, in *Trenticosta v. Mamoulides*, 93-CA-621 (La. App. 5th Cir. 2/23/94), 633 So.2d 786, specifically held the district attorney's voir dire notes to be work product. Although the request in that case was made pursuant to the Louisiana Public Records Act, the court's finding is nonetheless relevant: " . . . we conclude the following items listed as being retained ***are not subject to disclosure via the Work Product Rule: . . . (c) Item No. 13 . . . Jury panel,***

jury list and Assistant District Attorney's notes for voir dire . . . " (Emphasis added.)

It is against this backdrop of Louisiana law that the trial court has adopted a procedure in this matter that will test the veracity of the prosecutor's race-neutral reasons without violating the sanctity of the attorney work product. That procedure involves an in camera inspection of the state's notes, if the race-neutral reasons given are not apparent on the face of the record. The state has not objected to this proposed procedure, which it submits strikes the proper balance between protecting the rights of both the state and the defendant.

Lastly, petitioner cites *Rosa v. Peters*, 36 F.3d 625 (7th Cir. 1994), stating, "Courts have found that given the passage of time, even a hearing to determine whether jurors were improperly excluded may well be unsatisfactory. In those circumstances in which the court determines a hearing cannot be satisfactory for determining the issue, the defendant should get a retrial." The passage of time in *Rosa* was in excess of six years. The State of Louisiana would simply clarify that the United States Court of Appeals, Seventh Circuit, while noting that a post-trial hearing in that case "may well be unsatisfactory," properly left it to the discretion of the district court on remand to "decide if a hearing would be productive; if so, the district court should conduct a *Batson* hearing." The state also wishes to make perfectly clear that petitioner herein has not requested a retrial, either in this court or in any court below.

For nearly twenty-five years, this Honorable Court has left to the trial courts the task of implementing *Batson*. Petitioner has not shown this policy to be unworkable. In fact, the jurisprudence cited by petitioner would indicate otherwise. It would appear that courts across the country have not hesitated to exercise their discretion in fashioning particular procedures when faced with a *Batson* objection, either at trial or on remand.

Furthermore, petitioner is not without a remedy if he is in disagreement with the final outcome of his *Batson* claim. This Honorable Court very recently reversed a Louisiana Supreme Court judgment rejecting the defendant's *Batson* claim, finding that, based upon the record, the prosecutor's race-neutral reasons for striking a black prospective juror were pretextual. *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203 (2008).

CONCLUSION

For the foregoing reasons, the state respectfully requests that this court deny petitioner's application for writ of certiorari.

Respectfully submitted,

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